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In The Supreme Court of the United States

CHRISTOPHER A. ZUDELL,
Petitioner,

v.

MARGARET BRADSHAW, WARDEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED

I. Could jurists of reason conclude that Petitioner's application for state post-conviction or other collateral relief was "properly filed" for purposes of statutory tolling under 28 U.S.C. § 2244(d)(2), where the application was filed in accordance with all applicable state court rules for filing such an application, and was filed in the proper court and in compliance with time limits for its filing, but was dismissed by the state court on a ground labeled by the state court as "jurisdictional," but which is in substance under state law a routine procedural bar to granting the requested relief?

II. Where a state court denies a Petitioner's application for state post-conviction or other collateral relief for a reason identified by the state court as "jurisdictional," are the federal habeas courts bound by that label in deciding whether the application was "properly filed" for purposes of statutory tolling under 28 U.S.C. § 2244(d)(2), or, instead, must the federal courts make an independent determination of whether the applicable state rule was, in substance, a "condition to filing" or a "condition to obtaining relief" as per this Court's decision in *Artuz v. Bennett*, 531 U.S. 4 (2000)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher A. Zudell ("Zudell" or "Petitioner") respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The order of the U.S. Court of Appeals for the Sixth Circuit (Order, Apx A1-A2) is unreported. The opinion and order of the district court denying the habeas petition as barred by the 1-year statute of limitations (Opinion and Order, Apx C1-C11) is unreported, as is the district court's amended judgment entry denying a certificate of appealability. (Judgment Order, Apx B1-B2). The report and recommendation of the U.S. Magistrate Judge, recommending the denial of the habeas petition, is unreported. (Report & Recommendation, Apx E1-E28). The underlying decision of the Ohio Court of Appeals is unreported. (Opinion, Apx F1-F7).

JURISDICTION

The order of the U.S. Court of Appeals was entered on July 11, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2244(d), which provides:

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2253(c), which provides:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

A. *State Court Trial Proceedings*

Christopher A. Zudell was convicted in Ohio state trial court, pursuant to a guilty plea, of the following crimes: (1) five counts of rape, (2) one count of felonious sexual penetration, and (3) four counts of gross sexual imposition. These crimes all arose out of sexual contact Zudell had with his daughter who was younger than 13 at the time of the

offenses, and they occurred during the period from January 27, 1995 until December 27, 1997.

Zudell suffers from cerebral palsy and dystonia, a neurological disorder involving loss of muscle control.[1] He is now wheel-chair bound. Zudell had used in the past, and often overused, the drug Klonopin (whose generic name is clonazepam), a tranquilizer with anticonvulsant properties and a member of a class of drug known as benzodiazepines. At times relevant to the offenses at issue, Zudell may have been suffering from the affects of abusing and/or abruptly withdrawing from Klonopon. Among these affects are paranoid psychosis and delirium with catatonic features. Zudell was also diagnosed with Major Depressive Disorder and a serious character disorder characterized by low frustration tolerance, impulsivity and poor social judgment.

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[1] As defined by the Dystonia Medical Research Foundation, dystonia is a neurological movement disorder characterized by involuntary muscle contractions, which force certain parts of the body into abnormal, sometimes painful, movements or postures. Dystonia can affect any part of the body including the arms and legs, trunk, neck, eyelids, face, or vocal cords. While dystonia is not fatal, it is a chronic disorder and prognosis is difficult to predict. It is the third most common movement disorder after Parkinson's Disease and Tremor, affecting more than 300,000 people in North America. See Dystonia Medical Research Foundation, http://www.dystonia-foundation.org.

Zudell was sentenced on September 29, 1999, and the sentencing judgment was entered on October 5, 1999. The state trial court imposed the following terms of imprisonment: (1) seven to twenty-five years each for two of the rape counts and the one count of felonious sexual penetration; (2) five years each for three of the rape counts; (3) one and one-half years each for two of the counts of gross sexual imposition; and (4) three years each for two of the counts of gross sexual imposition. (D. Ct. Record No. 12, Exh. 3).

The sentences on the rape and felonious sexual penetration charges were all ordered to be served consecutively. The remaining sentences were ordered to be served concurrently.

The total combined sentence was thus a minimum of thirty-six (36) years in prison before Zudell will be eligible for parole, and a maximum of ninety (90) years in prison. This sentence is thus substantially harsher than the prison term that could be imposed in Ohio at that time for non-capital aggravated murder (which under Ohio law at the time was 20 years to life, Ohio Rev. Code Ann. § 2929.03(A)(1)), and even harsher than the sentences that could be imposed for ***capital*** aggravated murder in cases where the jury had not recommended death (which under Ohio law at the time were life imprisonment with parole eligibility after 20, or 30, years, Ohio Rev. Code Ann. § 2929.03(D)(2)).

Zudell was 36 years old at the time he was sentenced, and in poor health. Thus, his sentence, even at the minimum range, is an effective life sentence for a relatively young first time offender. The sentence utterly failed to account for Zudell's poor health or for the many compelling factors mitigating against an extended prison term.

B. *State Court Direct Appeal*

On October 27, 1999, Zudell timely appealed the trial court's sentencing judgment to the Ohio Court of Appeals, Ninth Judicial District. He challenged the sentence as being an abuse of the trial court's discretion, as inequitable, and as violative of the Eighth Amendment's prohibition against cruel and unusual punishment. He did not assign any errors challenging the legality and/or voluntariness of his guilty plea, nor did he raise any errors alleging that his plea agreement had been violated.

The Ohio Court of Appeals affirmed the trial court's judgment in a journal entry and opinion dated July 26, 2000. (D.Ct. Record No. 12, Exh. 7).

On December 6, 2000, the Ohio Supreme Court denied Zudell's timely request for a discretionary appeal and dismissed the appeal as not involving any substantial constitutional questions. (D.Ct. Record No. 12, Exh. 10).

Zudell did not seek certiorari from this Court and, accordingly, his direct appeal concluded and his conviction became final on March 6, 2001, the day which is 90 days after the Ohio Supreme Court denied discretionary review. *See generally* U.S. Sup. Ct. Rule 13; *Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003)(en banc), *cert. denied sub nom.*, 541 U.S. 1070 (2004).

C. *State Court Motion to Withdraw and/or Vacate Plea*

On May 1, 2001, many months before his 1-year statute of limitations to file a federal habeas petition would have run, Zudell timely filed in the state trial court his Motion to Vacate and/or Withdraw Guilty Plea. (D.Ct. Record No. 12, Exh. 11).

He filed this motion pursuant to Rule 32.1 of the Ohio Rules of Criminal Procedure, which provides that "to correct manifest injustice[,] the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." The rule provides no time limit for filing such a motion. *See, e.g., State v. Bush*, 96 Ohio St. 3d 235, 239 (2002).

In his motion to withdraw the plea, Zudell alleged that his decision to plead guilty to the charges was based solely upon: (1) statements and assurances by the State that in exchange for a guilty plea Zudell would receive a single

concurrent sentence in the 5-25 year range; and (2) his reasonable reliance on the State's representations, since learned to be wrong, that the State would not have to prove that he penetrated the victim in order to establish his guilt of the rape charges.

Zudell asked the trial court to permit him to withdraw his guilty plea in order to avoid manifest injustice, and because the guilty plea, in view of the State's material misrepresentations, was not a knowing, voluntary and intelligent plea in the circumstances of his case. In support of the motion, Zudell submitted his affidavit and a copy of the transcript of the sentencing proceedings.

By entry dated December 13, 2001, the state trial court entered an order denying Zudell's motion on the ground that, in the court's view, it "does not have jurisdiction to consider or grant" the motion under the Ohio Supreme Court's decision in *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St. 2d 94 (1978). (D.Ct. Record No. 12, Exh. 13).

On January 9, 2002, Zudell filed a timely appeal to the Ohio Court of Appeals, Ninth Judicial District. In his appellate brief, Zudell reminded the court that the Ohio Supreme Court's decision in *Special Prosecutors* is addressed to the very narrow set of circumstances presented in that case, *i.e.*, where the motion to withdraw the guilty plea had been filed *after* the movant had already litigated, and lost, on direct appeal his claims challenging the voluntariness of his plea. In

those unique circumstances, the Ohio Supreme Court held that the trial court did not have "jurisdiction" "to grant the motion to withdraw [the defendant's] plea of guilty and to proceed with a new trial," because doing so would be inconsistent with the appellate court's judgment which had rejected that claim. (D.Ct. Record No. 12, Exh. 15).

These unique circumstances are not presented here. Zudell's direct appeal did not include any challenges to the plea whatsoever. Only after his appeal was concluded, and as expressly permitted by Rule 32.1, did Zudell timely file his motion to withdraw the guilty plea. Accordingly, Zudell argued, the Ohio Supreme Court's decision in *Special Prosecutors* does not foreclose the trial court from considering his motion. (*Id.*).

The Ohio Court of Appeals affirmed the trial court's order in a decision and journal entry dated August 21, 2002. (D.Ct. Record No. 12, Exh. 16). (Opinion, Apx F1-F7).

On January 15, 2003, the Ohio Supreme Court denied Zudell's timely request for a discretionary appeal and dismissed the appeal as not involving any substantial constitutional questions. (D.Ct. Record No. 12, Exh. 19).

D. *Federal Habeas Proceedings*

On July 28, 2003, Zudell filed in the federal district court his petition for a writ of habeas corpus under 28 U.S.C. § 2254. (D.Ct. Record No. 1). His filing was made

comfortably within the 1-year statute of limitations ("SOL") provided in 28 U.S.C. § 2244(d) because:

> (1) the state court judgment of conviction became final by the conclusion of direct review on March 6, 2001;
>
> (2) a "properly filed" application for state post-conviction or other collateral review – i.e., Zudell's timely motion to withdraw and/or vacate his guilty plea – was pending from at least May 1, 2001 through January 15, 2003, thus allowing all of that time to be tolled in calculating the 1-year period; and
>
> (3) the total period of ***non***tolled time that had elapsed from the completion of direct review on March 6, 2001, was only some 248 days, which means that the filing of the habeas petition on July 28, 2003 was well within the 1-year period, and would have still been within the 1-year so long as it was filed on or before ***November 22, 2003***.

Zudell's habeas petition includes two grounds for relief. These are, first, that the trial court denied his rights to due process by denying a hearing on the motion to withdraw the guilty plea, and, second, that his sentence violates the Eighth Amendment prohibition against cruel and unusual punishment.

In a report and recommendation dated July 21, 2004, a magistrate judge recommended that the petition be denied because, among other reasons, the petition was barred by the 1-year SOL of Section 2244(d). (Report & Recommendation, Apx E1-E28). The magistrate concluded that Zudell's motion to withdraw the guilty plea did not toll the limitations period because that motion was not "properly filed" within the meaning of Section 2244(d)(2).

The district court on June 29, 2005, issued an opinion and order accepting the magistrate's recommendation and dismissing the habeas petition as barred by the 1-year SOL. (Opinion and Order, Apx C1-C11). The district court also held that Zudell was not entitled to equitable tolling. The district court did not address the merits of any of Zudell's habeas claims.

On August 17, 2005, the district court issued a one page amended judgment entry in which it declined to issue a COA because Zudell had not "made a substantial showing that a reasonable jurist would find this Court's ruling debatable pursuant to 28 U.S.C. § 2253(c)." (Judgment Order, Apx B1).

On a timely attempt to appeal to the Sixth Circuit, that court too declined a COA, holding in its one page order dated July 11, 2006, that "jurists of reason would not find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000)." (Order, Apx A1-A2).

REASONS FOR GRANTING THE WRIT

The refusal of the lower federal courts to grant a COA to Zudell is a misapplication of 28 U.S.C. § 2253 and this Court's decision in *Slack v. McDaniel*, 529 U.S. 473 (2000). *Slack* establishes the standard for a COA in a case where, as here, the habeas petition has been dismissed by the district court on procedural grounds without reaching the prisoner's underlying constitutional claim. "A COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 478.

Both the district court and the Sixth Circuit refused a COA to Zudell solely on the ground that, in the opinions of those courts, reasonable jurists could not debate the procedural ruling dismissing the petition as barred by the 1-year SOL contained in 28 U.S.C. § 2244(d). The ruling that the SOL bars Zudell's petition is premised on the district court's holding that Zudell's motion to withdraw his guilty plea was not a "properly filed" application for State post-conviction or other collateral review as required by 28 U.S.C. § 2244(d)(2), and, as such, Zudell was not entitled to statutory tolling during the period his motion to withdraw was pending from May 1, 2001 through January 15, 2003. If this

time period is ***not*** subject to statutory tolling as the lower courts held, then (absent equitable tolling) the habeas petition was not timely. If it ***is*** subject to statutory tolling, then the habeas petition was improperly dismissed because, rather than being late, Zudell's petition was in actuality filed some ***117 days before*** the deadline of November 22, 2003.

Under the holding of this Court in *Artuz v. Bennett*, 531 U.S. 4 (2000), Zudell's motion to withdraw his guilty plea is a "properly filed" application for State post-conviction or other collateral review within the meaning of 28 U.S.C. § 2244(d)(2). The motion was filed in accordance with all applicable state court rules for filing such a motion, was filed in the proper court, and was filed in compliance with the time limits for making such a filing. Although the Ohio state courts dismissed the motion to withdraw the guilty plea for alleged non-compliance with a non-time based state rule that was labeled by the state courts as "jurisdictional," the subject state rule is, in substance under state law, a routine application of the doctrines of res judicata and law of the case, and it serves, like the "'rule of decision' procedural bars" at issue in *Artuz* (*see Pace v. DiGuglielmo*, 544 U.S. 408, (2005)), only as a condition to obtaining relief and is not properly considered a condition to filing.

The lower federal courts failed to recognize this important point and, instead, accepted without any analysis the label the Ohio state courts had placed upon the state procedural rule. At the very least, the federal habeas court in

determining whether an application is "properly filed" under 28 U.S.C. § 2244(d)(2) must make its own independent determination, as a matter of ***federal law***, whether a non-time based rule invoked by the state to avoid statutory tolling is, in substance, a "condition to filing" or a "condition to obtaining relief" as per this Court's decision in *Artuz v. Bennett*, 531 U.S. 4 (2000). Where the subject state rule is something other than an unambiguous time limit to filing, this determination should be guided by the same considerations of comity and federalism which determine whether state procedural rules may be invoked to avoid federal habeas review in the directly analogous context of procedural defaults: *i.e.*, is the state rule, as of the time it was invoked to deny the habeas petitioner the benefit of statutory tolling, "adequate" in the sense that the rule is clearly announced, firmly established, and regularly and consistently applied by the state court? *See, e.g., Ford v. Georgia*, 498 U.S. 411, 423-24 (1991); *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988); *James v. Kentucky*, 466 U.S. 341, 348-49 (1984).

These considerations, as more fully developed below in the remainder of this Petition, all establish that the lower federal courts' refusal to grant a COA to Zudell in the circumstances of this case was not only subject to debate among reasonable jurists but was, indeed, a clear error. A COA should have been issued to allow Zudell to litigate his substantial federal constitutional claims.

1.

In *Artuz* this Court construed the "properly filed" requirement of Section 2244(d)(2) as follows: "An application is 'filed,' as that term is commonly understood, when it is delivered to, and accepted by, the appropriate court officer for placement into the official record. And an application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee." *Artuz v. Bennett*, 531 U.S. at 8 (citations and footnotes omitted).

The Court expressly recognized that "the question whether an application has been 'properly filed' is quite separate from the question whether the claims contained in the application are meritorious and free of procedural bar." *Id.* Thus, the Court recognized a distinction between, on the one hand, state rules that impose *conditions to filing*, and, on the other hand, those rules which impose *conditions to obtaining relief*. The procedural rules at issue in *Artuz* – *i.e.*, two New York state rules, one that barred raising an issue that had been previously determined on the merits upon an appeal from the judgment, and the other that barred raising a claim that was available on direct appeal but was not raised because of the defendant's "unjustifiable failure" – were held to be

"conditions to obtaining relief" because they "simply prescribe a rule of decision for a court confronted with claims that were 'previously determined on the merits upon an appeal from the judgment' of conviction or that could have been raised on direct appeal but were not." *Id.* at 10-11.

The meaning of "properly filed" was further addressed in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), with respect to a state rule that established an unambiguous time limit for filing an application for post-conviction or other collateral relief, a time limit the state court in that case found the petitioner had *not* met. The time limit in *Pace* was a Pennsylvania statute that required a post-conviction petition to be filed within one year from the date the petitioner's conviction became final. *Id.* at 411 n.1. The Court held that the time limit was a condition to filing, and this was so even though the state statute recognized certain exceptions to the one-year requirement that can prevent a late application from being considered improperly filed. "A petition filed after a time limit, and which does not fit within any exceptions to that limit, is no more 'properly filed' than a petition filed after a time limit that permits no exception." *Id.* at 413. Although upholding the Third Circuit's refusal to allow statutory tolling in *Pace*, this Court expressly maintained the distinction, recognized in *Artuz*, between conditions to filing, such as unambiguous time limits, and the type of "'rule of decision' procedural bars at issue in *Artuz*, which go to the ability to obtain relief." *Id.* at 413.

The Ohio rule enforced by the state courts to deny Zudell relief on his motion to withdraw and/or vacate his guilty plea, properly understood, does not impose a condition to filing, and is not an unambiguous time limit to filing. It is, instead, a classic example of a rule of decision procedural bar. As such, the Ohio rule does not prevent Zudell's timely filed motion to withdraw his guilty plea from being considered "properly filed" under Section 2244(d)(2). His motion was a "properly filed" application within the scope of Section 2244(d)(2), thereby entitling him to statutory tolling.[2]

Zudell's motion to withdraw and/or vacate his guilty plea was filed under Ohio Criminal Rule 32.1, which provides

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[2] The district court and the parties all correctly considered Zudell's motion to be an "application for State post-conviction or other collateral review with respect to the pertinent judgment or claim," as per Section 2244(d)(2), with the only question being whether it was a "properly filed" application. *See, e.g., York v. Galetka*, 314 F.3d 522, 528 (10th Cir. 2003)(defendant's motion to set aside his guilty plea should be treated as part of the state collateral review process for purposes of Section 2244(d)); *Nara v. Frank*, 264 F.3d 310 (3d Cir. 2001)(motion to withdraw guilty plea nunc pro tunc is part of collateral review for purposes of Section 2244(d)); *Colbert v. Head*, 146 Fed. Appx. 340 (11th Cir. 2005); *Thompson v. Chandler*, 36 Fed. Appx. 783, 784 (6th Cir. 2002).

as follows: "to correct manifest injustice[,] the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea."

Rule 32.1 is one of three recognized procedures in Ohio by which a criminal defendant may attack a judgment of conviction or sentence, the other two being: 1) direct appeal, and 2) a petition for post-conviction relief under Ohio Rev. Code § 2953.21 et seq. A post-sentencing motion to withdraw to correct manifest injustice under Rule 32.1 is the only one of these three procedures that does not prescribe a time limit for filing. A direct appeal must be filed within 30 days of the judgment appealed, and a petition for post-conviction relief must be filed no later than 180 days after the date on which the trial transcript is filed or no later than 180 days after the expiration of the time for filing the direct appeal. *See generally State v. Bush*, 96 Ohio St. 3d 235 (2002); *State v. Reynolds*, 2002 Ohio 2823, ¶31 (Ohio App. 2002). A motion to withdraw a guilty plea, by contrast, has no time restriction and may be filed at any time. *See Id.* ("Crim.R. 32.1 does not include a time restriction for filing"); *State v. Bush*, 96 Ohio St. 3d at 239 ("A criminal defendant can seek under Crim. R. 32.1 to withdraw a plea after the imposition of sentence. [The post-conviction statutes] do not govern the timeliness of such a motion. And Crim. R. 32.1 itself does not prescribe a time limitation.").

Thus, when Zudell filed his Rule 32.1 motion in the state trial court on May 1, 2001, he complied with all of the applicable state rules for filing such a motion. He filed the motion in the correct court, his filing was in the proper form, he made the appropriate allegations of manifest injustice and supported his allegations with an affidavit, and he filed the motion in a timely manner, which is to say after his sentence was pronounced. That the court's clerk accepted the motion and placed it on the docket, and thereafter the court directed the State to file a response, are indications that all the requisite conditions to filing had been met.

Zudell's Rule 32.1 motion also complied with the narrow limitations on Rule 32.1 that had been imposed by the Ohio Supreme Court in *Special Prosecutors*, *supra*, as that decision is properly understood ***and*** as it has been interpreted by numerous Ohio courts: *i.e.*, his motion did not simply repeat a challenge to the guilty plea that either: 1) he had already fully litigated and lost in a completed direct appeal (the precise issue addressed in *Special Prosecutors*), or 2) he was at that same time already litigating in his direct appeal.[3]

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[3] *See, e.g., State v. Foster*, 2005 Ohio 1008 (Ohio App. 2005)("The arguments raised by the appellant relative to the nature of his guilty plea have already been addressed in Foster I. There, this court found that there was 'nothing in the record to suggest that Foster's plea was not knowingly, voluntarily and intelligently made.' We therefore decline to address appellant's first assignment of error pursuant to the

His was a first time challenge to the voluntariness of his plea and to the State's material misrepresentations that unfairly induced him to accept that plea. In this respect, Zudell's motion was no different in substance or in form from those Rule 32.1 motions to withdraw a guilty plea that Ohio courts

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doctrine of res judicata."); *State v. Cvijetinovic*, 2003 Ohio 7071 (Ohio App. 2003)(because defendant already challenged his guilty plea on direct appeal and lost, the rule of *Special Prosecutors* bars a second challenge); *State v. Tate*, 2004 Ohio 2979 (Ohio App. 2004)(claims raised in Rule 32.1 motion to withdraw had already been "raised and decided in *Tate I* and *Tate II*. Pursuant to the doctrine of res judicata, Tate is barred from re-litigating these issues on this appeal."); *State v. Gaston*, 2003 Ohio 5825 (Ohio App. 2003)(*Special Prosecutors*' rule of "no jurisdiction" is limited to only those Rule 32.1 motions that reassert claims that have already been rejected in the direct appeal and which are thus the law of the case); *State v. McGee*, 2004 Ohio 2856 (Ohio App. 2004)(trial court did not have jurisdiction to rule on a motion to withdraw a guilty plea because defendant's prior motion to withdraw had been denied, appealed, and that denial had been affirmed on appeal); *State v. Smith*, 2003 Ohio 3675 (Ohio App. 2003)(where direct appeal determined that the plea was voluntarily, intelligently, and knowingly made, defendant's second challenge to the propriety of the plea is barred); *State v. White*, 142 Ohio App. 3d 132, 137 (2001)("White failed to file a direct appeal of his conviction. [T]he doctrine of res judicata bars his attempt to withdraw his guilty plea because those issues could have been fully litigated on direct appeal from that judgment.").

have routinely permitted to go forward, after *Special Prosecutors*, without any alleged "jurisdictional" barrier to review, even though filed ***many years*** after the movants' convictions had become final with the expiration of the time for seeking direct review.[4]

Thus, although the Ohio state courts dismissed Zudell's motion to withdraw his guilty plea for alleged non-compliance with the non-time based rule of *Special Prosecutors*, a rule which Zudell's state courts admittedly

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[4] *See, e.g., State v. Bush*, 96 Ohio St. 3d 235 (motions to withdraw filed three years and ten years after convictions were final); *State v. Gaston*, 2003 Ohio 5825 (Ohio App. 2003)(trial court had jurisdiction to consider motion to withdraw filed after conviction had been affirmed on appeal, but the motion was subject to being rejected on res judicata grounds); *State v. Reynolds*, 2002 Ohio 2823 (Ohio App. 2002)(court had jurisdiction over motion filed two years after conviction became final, but res judicata "prevents us from reaching the merits" of the motion); *State v. Gomez*, 2002 Ohio 5255 (Ohio App. 2002)(motion filed 3½ years after conviction was final); *State v. White*, 2004 Ohio 2809 (Ohio App. 2004)(motion filed after conviction became final); *State v. Gegia*, 2003 Ohio 3313 (Ohio App. 2003)(motion filed nearly three years after conviction became final); *State v. Graham*, 2004 Ohio 3019 (Ohio App. 2004)(motion filed 6 years after conviction was final); *State v. Kerns*, 2000 Ohio App. LEXIS 3202 (2000)(motion filed 10 years after conviction became final); *State v. Gibbs*, 2000 Ohio App. LEXIS 2526 (2000)(motion filed 6 years after conviction became final).

labeled as "jurisdictional," it is clear that the rule applied in *Special Prosecutors* is in substance under state law a routine application of the doctrines of res judicata and law of the case. It is, in other words, a classic example of a rule of decision procedural bar, just like the New York rules addressed in *Artuz*. Indeed, the Ohio rule is in all material respects identical to the New York rules at issue in *Artuz*. The New York rules imposed bars to raising claims that had been "previously determined on the merits upon an appeal from the judgment," N. Y. Crim. Proc. Law § 440.10(2)(a) (McKinney 1994), and claims that were available on direct appeal but were not raised because of the defendant's "unjustifiable failure." *Id.*, § 440.10(2)(c). *Artuz*, 531 U.S. at 7 & n.1. The rule applied in *Special Prosecutors* does the same thing as these New York rules in that it "simply prescribe[s] a rule of decision for a court confronted with claims that were 'previously determined on the merits upon an appeal from the judgment' of conviction or that could have been raised on direct appeal but were not." *Artuz*, 531 U.S. at 10-11. *See, e.g.*, Ohio cases cited at notes 3 and 4, *supra*.

3.

In making the determination of whether Zudell's motion was "properly filed" for purposes of the federal habeas statute and its SOL contained in Section 2244(d)(2), the federal habeas courts were required to engage in their *own*

independent analysis, as a matter of federal law, and should not have blindly accepted the state courts' labeling of the state rule that was relied upon by the state courts in dismissing Zudell's motion. It is the substance of the rule, not its label, that matters for purposes of Section 2244(d)(2).

The substance of the Ohio rule, as detailed above, confirms that *only* if the defendant's motion to withdraw the guilty plea seeks to re-litigate the very same plea issues he has already raised and lost in his direct appeal, or the very same plea issues he is then contemporaneously litigating in the direct appeal, is there an absence of "jurisdiction" within the scope of *Special Prosecutors*. In all other circumstances, including those confronting Zudell when he filed his Rule 32.1 motion on May 1, 2001, the trial court is ***not*** barred from *considering* the motion but may be required to deny it under the doctrine of res judicata.

To the extent the Ohio state courts concluded otherwise in dismissing Zudell's motion, applying a "jurisdictional" bar, that state rule is not one that can be relied upon to deny Zudell the benefit of statutory tolling under Section 2244(d)(2). Just as in the analogous context of procedural defaults, a state procedural rule cannot bar federal review of a habeas petitioner's federal constitutional claims unless the state rule is determined by the federal court to be "adequate." In order to be "adequate," the state procedural rule must at a minimum be clearly announced, firmly established, and regularly and consistently applied by the state

court. *See, e.g., Ford v. Georgia*, 498 U.S. 411, 423-24 (1991); *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988); *James v. Kentucky*, 466 U.S. 341, 348-49 (1984).

And, whether a state rule is adequate for these purposes is something that must be decided as a matter of *federal law*. "The adequacy of state procedural bars to the assertion of federal questions ... is not within the State's prerogative finally to decide; rather, adequacy 'is itself a federal question.'" *Lee v. Kemna*, 534 U.S. 362, 375 (2002)(quoting *Douglas v. Alabama*, 380 U.S. 415, 422 (1965)).

At least four circuits have applied these adequacy principles from the procedural default context in determining whether a state procedural rule can be used to deny a habeas petitioner the benefit of statutory tolling under Section 2244(d)(2). *See, e.g., Siebert v. Campbell*, 334 F.3d 1018, 1025 (11th Cir. 2003)("The aims of comity and federalism that animate both AEDPA and the doctrine of procedural default favor deference toward state procedural rules only when their consistent application demonstrates the state's real reliance on them as a means to the orderly administration of justice. Accordingly, we conclude that a rule governing filings must be 'firmly established and regularly followed' before noncompliance will render a petition improperly filed for the purpose of AEDPA's tolling provision."); *Jenkins v. Johnson*, 330 F.3d 1146 (9th Cir. 2003)("[B]ecause [the subject state rule] was not an adequate state ground of decision for

procedural bar purposes ... and because [the rule] does not impose an absolute bar to filing but instead only a condition to obtaining relief, [the state court] petition was properly filed."); *Gray v. Briley*, 305 F.3d 777, 778-79 (7th Cir. 2002); *Emerson v. Johnson*, 243 F.3d 931, 935 (5th Cir. 2001).

The rule applied by the Ohio state courts in Zudell's case to impose a "jurisdictional" bar on his never-before-asserted challenge to his guilty plea is not an adequate state rule under these principles. The rule that was applicable at the time Zudell filed his motion in May 2001, is the rule *he followed*: *i.e.*, a post-conviction Rule 32.1 motion is to be filed in the trial court any time after sentencing to correct manifest injustice and, so long as the claims in the motion have not been previously litigated and lost in the direct appeal, the trial court has jurisdiction to consider the motion. *See, e.g.*, Ohio cases cited *supra* at nn. 3-4. Applying *Special Prosecutors* to impose a *jurisdictional* bar on a trial court's consideration of a motion to withdraw a guilty plea that raises claims never before litigated by the movant in the direct appeal, such as Zudell's motion, is at the very least an *inconsistent* application of the Ohio rule announced in *Special Prosecutors*, and is indeed an *incorrect* application of that rule. *See, e.g., State v. Gaston*, 2003 Ohio 5825, ¶¶4-5 (Ohio App. 2003).[5] Whether inconsistent or incorrect, or both, the

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[5] There, the court held: "When a defendant takes a direct appeal challenging a guilty plea, the trial judge loses

state rule invoked to deny Zudell the benefit of statutory tolling under Section 2244(d)(2) is not adequate and, therefore, cannot foreclose federal review.

4.

For many of these same reasons, Zudell is, at a minimum, entitled to equitable tolling. Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Zudell can meet both of these requirements.

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jurisdiction to entertain a Crim. R. 32.1 motion for withdrawal of the plea. In this case, however, Gaston filed a direct appeal of his sentence only, and did not question his plea. Although at least one appellate decision has found that appeal of a sentence divests the trial judge of jurisdiction over a subsequent Crim. R. 32.1 motion [citing Zudell's case], the Ohio Supreme Court's language in *State ex rel. Special Prosecutors, supra*, is less broad... The principle expressed in *State ex rel. Special Prosecutors* is viewed as part of the law of the case doctrine, which bars the relitigation of issues resolved in appellate decisions. Therefore, the bar of inconsistent judgments reaches only as far as the 'mandate' of the appellate court, and issues not resolved in its opinion remain within the trial judge's authority." *Id.*

He was diligently pursuing his claims in the state courts, including his challenges to the guilty plea, in the manner and under the procedures prescribed by state law. The state courts misapplied the rule of *Special Prosecutors* to impose an inapplicable "jurisdictional" bar to the state trial court's consideration of his timely motion to withdraw. When he timely presented his habeas petition in federal court (and, indeed, with more than 100 days to spare), the federal habeas courts accepted the state-applied jurisdictional bar without engaging in the independent determination under federal law required by Section 2244(d) to determine whether the state rule, in substance as opposed to form, is a condition to filing or a condition to obtaining relief. And, the federal courts enforced the state bar even though the state rule as applied in the circumstances of Zudell's case was, at the very least, an inadequate rule under the procedural default principles applicable in this analogous context.

These extraordinary circumstances, coupled with his diligence in pursuing his claims, make this, at the very least, an appropriate case for equitable tolling.

5.

There can be no legitimate dispute that jurists of reasons could debate the district court's procedural ruling dismissing Zudell's habeas petition as barred by the 1-year SOL. Indeed, as discussed above, such jurists should conclude

that the dismissal on SOL grounds was in error in this case and that Zudell's habeas petition was timely filed. Zudell's habeas petition raises legitimate and substantial constitutional claims, and jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right. Zudell was thus entitled to a COA. The lower federal courts erred in refusing to grant him one.

CONCLUSION

For all of these reasons, and in the interest of justice, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

SIXTH CIRCUIT COURT OF APPEALS:

Order,
filed 07/11/06 ..... A1-A2

NORTHERN DISTRICT OF OHIO:

Judgment Order,
filed 08/17/05 ..... B1-B2

Opinion and Order,
filed 06/29/05 ..... C1-C11

Judgment Order,
filed 06/29/05 ..... D1-D1

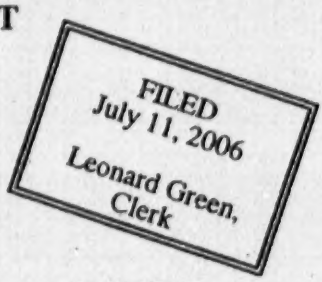
Magistrate's Report & Recommendation,
filed 07/21/04 ..... E1-E28

OTHER:

Ohio Court of Appeals Opinion,
decided 08/21/02 ..... F1-F7

No. 05-4477

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



CHRISTOPHER ZUDELL,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	**ORDER**
	)	
MARGARET BRADSHAW, Warden	)	
	)	
Respondent-Appellee.	)	
	)	

Christopher Zudell appeals a district court judgment that dismissed his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254 as barred by the applicable one-year statute of limitations, 28 U.S.C. § 2244(d)(1). The district court denied Zudell a certificate of appealability, and the receipt of the notice of appeal has been construed as an application for a certificate of appealability pursuant to Fed. R. App. P. 22(b).

Upon consideration, the motion for a certificate of appealability is denied because jurists of reason would not find it debatable whether the district court was correct in its

procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHRISTOPHER A. ZUDELL	)	**CASE NO. 1:03CV1591**
Petitioner,	)	
	)	**JUDGE CHRISTOPHER A. BOYKO**
vs.	)	
MARGARET BRADSHAW, Warden	)	**JUDGMENT ORDER**
Respondent.	)	

FILED
Aug. 17, 2005
North District of Ohio, Clerk

CHRISTOPHER A. BOYKO, J:

Pursuant to this Court's Opinion and Order of June 29, 2005, it is ordered that this action is dismissed.

This court declines to issue a certificate of appealability as petitioner has not made a substantial showing of the denial of a constitutional right and has not made a substantial showing that a reasonable jurist would find this Court's ruling debatable pursuant to 28 U.S.C. § 2253(c).

The Court's Judgment Order of June 29, 2005, is amended to reflect this Court's denial of an issuance of a certificate of appealability.

IT IS SO ORDERED.

8/15/05
Date

/s/ Christopher A. Boyko
CHRISTOPHER A. BOYKO
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHRISTOPHER A. ZUDELL	)	**CASE NO. 1:03CV1591**
Petitioner,	)	
vs.	)	**JUDGE CHRISTOPHER A. BOYKO**
MARGARET BRADSHAW, WARDEN	)	**OPINION AND ORDER**
Respondent.	)	

FILED
June 29, 2005
Northern District of Ohio,
Clerk

CHRISTOPHER A. BOYKO, J:

This matter is before the Court upon the Petitioner's timely objections to Magistrate Judge Nancy Vecchiarelli's denial of his Petition for Habeas Corpus. For the following reasons, the Court accepts the Report and Recommendation.

I. FACTUAL BACKGROUND

Substantive Facts

Petitioner Christopher Zudell ("Zudell") raped his seven year old daughter from January 27, 1995 to

December 27, 1997. Zudell claimed that he committed the acts while suffering withdrawal from the drug Klonopin. Furthermore, Zudell asserted that he suffered from a character disorder resulting in impulsiveness, low frustration tolerance and poor social judgment. Currently, Zudell is wheel chair bound and suffering from Cerebral Palsy and Dystonia, a neurological disorder involving loss of muscle control.

Procedural History

The State of Ohio charged Zudell with five counts of rape, tour counts of gross sexual imposition and one count of felonious sexual penetration, all including force specifications. InitiaJly, Zudell pled not guilty and not guilty by reason of insanity. As part of a plea deal, Zudell entered a plea of guilty. In return the state dropped the force specifications. For two of the rape charges and the felonious sexual penetration charge the trial court sentenced Zudell to seven to twenty-five years each, running consecutively. The court also sentenced Zudell to serve, concurrently five years each for the three remaining rape charges; one and one half years each for two gross sexual imposition charges and; three years each for two

gross sexual imposition charges. Zudell filed a timely notice of appeal on October 27, 1999.

Both the Ohio Ninth District Court of Appeals and the Ohio Supreme Court affirmed Zudell's conviction. resulting in a final judgment on March 6, 2001. Zudell then filed a Motion to Vacate and/or Withdraw Guilty Plea ("Motion"). The trial court dismissed the Motion On the grounds that it lacked jurisdiction and the appellate court affirmed. Thereafter, on January 15, 2003, the Ohio Supreme Court declined jurisdiction and dismissed Zudell's appeal on the motion to withdraw his guilty plea. On July 28, 2003, Zudell filed a Petition for Writ of Habeas Corpus ("Petition") naming warden Margaret Bradshaw ("Bradshaw") as the defendant.

Zudell asserts two claims in the Petition. First, he claims the trial court violated the Fourteenth Amendment Due Process Clause by denying him a hearing on the Motion. Second, he claims his sentence violates the Eighth Amendment's ban on cruel and unusual punishment.

The Magistrate found that the statute of limitations barred Zudell's Motion and found that there were no constitutional violations. In his timely objection to the Magistrate's Report and Recommendation, Zudell re-

alleges both constitutional claims and also objects to the Magistrate's findings that the Motion was time barred and that he was not entitled to an evidentiary hearing.

II. LAW AND ANALYSIS

Standard of Review

Federal Rule of Civil Procedure 72, which governs this matter provides in part:

> **(b) Dispositive Motions and Prisoner Petitions.**
>
> ...The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

As stated in the Advisory Committee Notes, "The term 'de novo' signifies the magistrate's findings are not protected by the clearly erroneous doctrine, but does not indicate that a second evidentiary hearing is required." citing *United States v. Raddatz*, 447 U.S. 667 (1980). The Court in

Raddatz stated "(t)he use of the words 'de novo determination' *is not intended to require the judge to actually conduct a new hearing* on contested issues." 447 U.S. 667 at 676 (emphasis original).

The Statute of Limitations Barred Zudell's Petition

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") applies to the instant action because Zudell filed his habeas corpus petition after April 24, 1996, the effective date of the Act. Pub. L. No. 104-132. (*see also Lindh v. Murphy*, 521 U.S. 320, 326-27, 337 (1997)). The AEDPA modified 28 U.S.C. § 2244 by adding a new subsection which provides in relevant part that:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall

not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1)(A) and (2)

The Ohio Supreme Court dismissed Zudell's direct appeal on December 6, 2000. Zudell's conviction became final on March 6, 2001, the date on which the time expired for him to file a petition for certiorari to the United States Supreme Court. A petitioner must file a petition for certiorari from a judgment by a state court of last resort within 90 days after entry of the judgment. U.S. Sup Ct. Rule 13. Bradshaw alleges that the one-year statute of limitations began running on March 6, 2001, the date of the final determination of the case. Zudell claims that his Motion, filed on May 1, 2001, tolled the statute of limitations. The Ohio Supreme Court declined jurisdiction and dismissed the Motion on January 15, 2003. Zudell claims that these post-conviction procedures tolled the limitations period between May 1, 2001 and January 15, 2003.

A. Zudell Did Not Properly File the Motion

In order for a post-conviction petition to toll the limitations period a petitioner must properly file it. 28

U.S.C. § 2244(d)(2). An applicant properly files for post-conviction relief when the application's delivery and acceptance comply with the applicable law and rules governing filings. *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). In Ohio, a defendant may only make a motion to withdraw a guilty plea before the court imposes a sentence, except to correct manifest injustice. Ohio Crim. R. Rule 32.1. Ohio courts define "'manifest injustice' as a 'clear or openly unjust act.'" *State v. Castillo*, 2005 Ohio 93, at ¶10 (Ohio App., 8th Dist. 2005). *Castillo* further defined manifest injustice as an "extraordinary and fundamental flaw in the plea proceedings." *Id.* Furthermore, a petitioner makes a Rule 32.1 motion to the discretion of the trial court and an appellate court will not overturn a trial court's decision absent an abuse of that discretion. *State v. Stumpf*, 32 Ohio St. 3d 95, 104 (1987). Zudell has not claimed that the court abused its discretion in denying his motion to withdraw his guilty plea; he merely claims the trial court erred. Moreover, Zudell showed no evidence of a fundamental flaw in the plea proceedings that would warrant this Court finding that manifest injustice were present. Therefore, Zudell did not properly file the Motion.

B. Zudell Filed a Jurisdictionally Deficient Motion

The general rule in Ohio is that a trial court loses jurisdiction of a case when the appellate court affirms the trial court's judgment and sentence. *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St. 2d 94, 97 (1978). In *Special Prosecutors*, the Ohio Supreme Court held that the trial court does not have jurisdiction to rule on a motion to withdraw a guilty plea after an appeal and affirmance by the appellate court. *Id.* at 97-98. Similarly to the petitioner in *Special Prosecutors*, Zudell's case went through the entire direct appeal process before he attempted to change his plea. The trial court did not have jurisdiction to consider the Motion.

A motion to withdraw a guilty plea is not properly filed and will not toll the statute of limitations if the trial court does not have jurisdiction to consider the motion. *Godfrey v. Beightler*, 54 Fed. Appx. 431, 432-33 (6th Cir. 2002) (unpublished opinion). Therefore, because Zudell did not properly file the Motion the trial court did not have jurisdiction to rule on it. The subsequent review of the improperly filed Motion by state appellate courts does not cleanse the Motion of its impropriety.

C. Zudell's Motion Does Not Toll the Statute of Limitations.

Zudell cites 28 U.S.C. § 2244(d)(2) stating that his post-conviction application is pending and thus tolls the limitations period. He states that an application is pending as long as the ordinary collateral review process continues; that is, until completion of the process. *Carey v. Saffold*, 536 U.S. 214 (2002). The process, however, never began because the trial court did not have jurisdiction over the Motion.

Zudell next asserts that the doctrine of equitable tolling should apply to the instant action. For equitable tolling to apply the petitioner must also diligently pursue 28 U.S.C. § 2254 relief. *Coleman v. Johnson*, 184 F.3d 398, 403 (5th Cir. 1999). Moreover, the doctrine of equitable tolling only applies when strict application to the 28 U.S.C. 2244(d)(1) statute of limitations would be inequitable. *Id.* at 402. Zudell claims the Court should apply the doctrine of equitable tolling because the State of Ohio forced him into a Hobson's choice between pursuing a direct appeal or filing a motion to withdraw his plea. This argument is deficient, however, because Zudell alleges that he filed the Motion due to the harsh sentence: he knew the sentence

was harsh after the trial court handed it down. Zudell merely had to file a timely motion to withdraw the plea and then, within the applicable time period, file a direct appeal requesting a limited remand from the Court of Appeals so that the trial court could rule on the Motion. Filing a motion to withdraw a guilty plea would not preclude a defendant from then filing a direct appeal. Instead, Zudell chose to file his direct appeal. Upon completion of the appeal process Zudell filed a jurisdictionally deficient Motion. The "forced choice" of which Zudell complains is nonexistent. Therefore, Zudell did not show the due diligence required in pursuing § 2254 relief and equitable tolling does not apply.

III. DECISION

The one-year statute of limitations for Zudell's Petition for a Writ of Habeas Corpus began running on March 6, 2001, the final judgment of his case. Zudell did not file the Petition until July 28, 2003, outside of the statutory period. There is no reason for Zudell to benefit from the doctrine of equitable tolling. This finding alone is sufficient to dismiss the petition, so the Court need not address the other elements of Zudell's objections.

The Court agrees with the Magistrate's Report and Recommendation and holds that the statute of limitations bars Zudell's Petition. Therefore, the Court dismisses Zudell's Petition for Writ of Habeas Corpus.

IT IS SO ORDERED.

6/24/05
Date

/s/ Christopher A. Boyko
CHRISTOPHER A. BOYKO
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHRISTOPHER A. ZUDELL	)	**CASE NO.**
	)	**1:03CV1591**
Plaintiff,	)	
	)	**JUDGE**
vs.	)	**CHRISTOPHER**
	)	**A. BOYKO**
MARGARET BRADSHAW, WARDEN	)	
	)	**JUDGMENT**
	)	**ORDER**
Defendant.	)	

FILED
June 29, 2005
Northern District
of Ohio,
Clerk

CHRISTOPHER A. BOYKO, J:

Pursuant to Rule 58 and this Court's Order of June 24, 2005, judgment is rendered in favor of Defendant and against Plaintiff. Case is dismissed.

IT IS SO ORDERED.

6/24/05
Date

/s/ Christopher A. Boyko
CHRISTOPHER A. BOYKO
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHRISTOPHER A. ZUDELL,	)	**CASE NO. 1:03CV1591**
Petitioner,	)	
	)	**JUDGE WELLS**
vs.	)	
	)	**MAGISTRATE JUDGE VECCHIARELLI**
MARGARET BRADSHAW, Warden,	)	
	)	
Respondent.	)	

FILED
July 21, 2004
Northern District of Ohio, Clerk

REPORT & RECOMMENDATION

Petitioner, Christopher Zudell ("Zudell"), challenges the constitutionality of his conviction in the case of *State v. Zudell*, Case No. 98 CR 051488. Zudell, through counsel, filed a Writ of Habeas Corpus (Doc. No. 1) pursuant to 28 U.S.C. § 2254 on July 28, 2003 with the United States District Court for the Northern District of Ohio. This matter is before the undersigned Magistrate Judge pursuant to Local Rule 72.2. For reasons set forth in detail below, the Magistrate Judge recommends Zudell's petition (Doc. No. 1) be DENIED.

I. Procedural History

A. Conviction

On February 11, 1998, the Grand Jury of Lorain County returned a ten-count indictment charging Zudell with: five counts of rape in violation of Ohio Revised Code ("O.RC.") § 2907.02(A)(l)(b); four counts of gross sexual imposition in violation of O.R.C. § 2907.05(A)(4); and one count of felonious sexual penetration in violation of O.R.C. § 2907.12(A)(l)(b). (Doc. No. 12, Exh. 1.) The rape counts and the felonious sexual penetration count included force specifications.

Zudell initially pleaded not guilty and not guilty by reason of insanity. Zudell later changed his plea to guilty on all charges; the State dropped the force specifications. (Doc. No. 12, Exhs. 2, 7.) On September 29, 1999, the trial court sentenced Zudell to a prison term of: seven to twenty-five years on two rape counts and the felonious sexual penetration count; five years each on three rape counts; one and one-half years each on two counts of gross sexual imposition; and three years each on two counts of gross sexual imposition. The trial court ordered the sentences on the rape and felonious sexual penetration counts to be

served consecutively, and the remaining sentences to be served concurrently. (Doc. No. 12, Exh. 3.)

B. Direct Appeal

On October 27, 1999, Zudell, through counsel, appealed the trial court's judgment and sentence to the Ohio Court of Appeals, raising three assignments of error:

> I. The trial court abused its discretion in sentencing Appellant to a minimum term of thirty six years for his offenses.
>
> II. Appellant's sentence is inequitable given he will not be eligible for parole for thirty six years whereby pleading guilty to the complaint would have made Appellant eligible for parole after only ten years.
>
> III. Appellant's sentence is violative of both the Eighth Amendment's and Section 9, Article I of the Ohio Constitution's prohibition against cruel and unusual punishment.

(Doc. No. 12, Exh. 5.) On July 26, 2000, the Court of Appeals affirmed the trial court's judgment. (Doc. No. 12, Exh. 7 (hereafter referred to as "Zudell I").)

On September 11, 2000, Zudell, through counsel, appealed the Court of Appeals' decision to the Ohio

Supreme Court, asserting the three assignments of error he raised in the Court of Appeals. (Doc. No. 12, Exh. 9.) On December 6, 2000, the Ohio Supreme Court dismissed Zudell's appeal as not involving any substantial constitutional question. (Doc. No. 12, Exh. 10.)

C. Motion to Withdraw Guilty Plea

On May 1, 2001, Zudell, through counsel, filed a Motion to Vacate and/or Withdraw Guilty Plea in the trial court. (Doc. No. 12, Exh. 11.) On December 13, 2001, the trial court denied Zudell's motion on the ground that it did not have jurisdiction to consider Zudell's motion. (Doc. No. 12, Exh. 13.)

On January 9, 2002, Zudell, through counsel, appealed the trial court's denial of his motion to the Court of Appeals, raising one assignment of error:

> I. The trial court erred by not permitting a hearing on Defendant-Appellant's motion to withdraw his plea.

(Doc. No. 12, Exh. 10.) On August 21, 2002, the Court of Appeals affirmed the trial court's decision. (Doc. No. 12, Exh. 16 (hereafter referred to as "Zudell II").)

On October 3, 2002, Zudell, through counsel, appealed the Court of Appeals' decision to the Ohio Supreme Court, presenting one proposition of law:

> I. A court's requirement that a defendant choose between filing a motion to withdraw his plea and filing an appeal of his sentence is a complete misinterpretation of this Court's holding in *State ex rel. Special Prosecutors v. Judges Court of Common Pleas* (1978), 55 Ohio St.2d 94, and is a violation of a defendant's right to due process and equal protection.

(Doc. No. 12, Exh. 18.) On January 15, 2003, the Ohio Supreme Court declined jurisdiction to hear the case and dismissed Zudell's appeal as not involving any substantial constitutional question. (Doc. No. 12, Exh. 19.)

D. Federal Habeas Petition

On July 28, 2003, Zudell, through counsel, filed a Petition for Writ of Habeas Corpus, asserting two grounds for relief:

> GROUND ONE: The trial court violated the United States Constitution's Fourteenth Amendment Guarantee to due process by denying a hearing on the petitioner's motion to withdraw his plea.

> GROUND TWO: The sentence in this case violates the United States Constitution's Eighth Amendment ban on cruel and unusual punishment.

(Doc. No.1.)

II. Statute of Limitations

This case is governed by provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996), because Zudell filed his habeas corpus petition after the effective date of the AEDP A. *See Lindh v. Murphy*, 521 U.S. 320, 326-27, 337 (1997). In the AEDPA, Congress enacted a statute of limitations for the filing of habeas petitions. The statute provides, in relevant part:

> (d)(1) A one year period of limitations shall apply to the filing of an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.
>
> * * *

> (2) The time during which a properly filed application for State post conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(I)(A) and (2).

Once the limitations period has expired, state collateral review proceedings can no longer serve to avoid the statute of limitations bar. *See Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) ("A state-court petition...that is filed following the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled").

Further, in order for a post-conviction petition to toll the limitations period while it is pending in state court, the petition must be "properly filed." *See* 28 U.S.C. § 2244(d)(2). A petition for post-conviction relief is properly filed when it is delivered to and accepted by the appropriate court officer for placement into the official record in compliance with the *applicable laws and rules governing filings*, including the time limits upon its delivery. *See Artuz v. Bennett*, 531 U.S. 4, 8 (2000)(emphasis added).

Respondent asserts that Zudell's habeas petition is time-barred because he failed to file it within the one-year limitations period. On December 6, 2000, the Ohio Supreme Court dismissed Zudell's direct appeal. Zudell's conviction became final on March 6, 2001, when the time expired within which Zudell could have filed a petition for certiorari in the United States Supreme Court. *See* U.S. Sup. Ct. Rule 13 (petition for certiorari must be filed within 90 days after the entry of judgment by the "state court of last resort"). Therefore, Respondent alleges the one-year statute of limitations began running on March 6, 2001 and Zudell's claim is time-barred because he did not file his habeas petition until July 28, 2003, more than a year later.

Zudell claims his habeas petition is timely because he tolled the limitations period. On May 1, 2001, Zudell filed an unsuccessful motion to withdraw his guilty plea in the trial court, which he appealed to the Court of Appeals and subsequently to the Ohio Supreme Court. (Zudell II.) On January 15, 2003, the Ohio Supreme Court declined jurisdiction and dismissed Zudell's appeal on the motion to withdraw his guilty plea. Zudell alleges that the limitations period was tolled while his motion was pending in the

state's post-conviction procedures, *i.e.*, from May 1, 2001 to January 15, 2003.

Zudell relies on *Colwell v. Tanner*, 2003 U.S. App. LEXIS 20840, at *7 (6th Cir., Oct. 9, 2003), in support of his tolling argument. However, *Colwell* is distinguishable from the instant action. In *Colwell*, the petitioner, following the imposition of the sentence, did not appeal the trial court's judgment and sentence, but instead filed a motion to withdraw his guilty plea in the trial court. *Id* at *2. Therefore, in *Colwell*, the petitioner's unsuccessful motion to withdraw and the subsequent appeals of the motion were considered part of the state's direct review process, not a collateral challenge. *Id* at *7-8; *see State v. Bush*, 773 N.E.2d 522, 526 (Ohio 2002). Moreover, *Colwell* did not involve any question about the court's jurisdiction to entertain the motion to withdraw. The court in *Colwell* merely held that the petitioner's motion to withdraw his guilty plea tolled the limitations period until the direct review period ended. *Colwell*, 2003 U.S. App. LEXIS 20840, at *7-8. However, in the instant action, Zudell, following the trial court's imposition of the sentence, appealed the trial court's judgment and sentence to the Court of Appeals, and subsequently to the Ohio

Supreme Court. Zudell then filed a *post-conviction* motion to withdraw his guilty plea in the trial court *after* the Court of Appeals affirmed the trial court's judgment and sentence and the Ohio Supreme Court dismissed his direct appeal.

Moreover, the trial court denied Zudell's motion to withdraw on the ground that it lacked jurisdiction since the Court of Appeals previously affirmed the trial court's judgment and sentence. This decision is based on a state procedural rule set forth in *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 97-98 (1978). In *Special Prosecutors*, the Ohio Supreme Court held that the trial court does not have jurisdiction to maintain and determine a motion to withdraw a guilty plea *subsequent* to an appeal and affirmance by the appellate court. *Id.* As the trial court did not have jurisdiction to consider Zudell's motion to withdraw and dismissed it solely on this ground, the motion was not properly filed under 28 U.S.C. § 2244(d)(2). *See Godfrey v. Beightler*, 54 Fed. Appx. 431 (6th Cir. 2002) (unpublished opinion) (A motion to withdraw a guilty plea is not "properly filed" and

does not toll the limitations period if the trial court did not have jurisdiction to consider the motion).[1]

Therefore, Zudell's motion did not toll the limitations period, which expired on March 6, 2002. Since Zudell did not file the habeas petition until July 28, 2003, it is time-barred and should be dismissed. Although this ground alone is sufficient to dismiss the petition, the Court nevertheless will address other issues raised by the petition.

II. Procedural Default and Exhaustion

Procedural default occurs when the petitioner fails to present his federal constitutional claim to the state courts in the manner required by state procedural law, and the state courts impose the procedural bar of refusing to review the merits of the alleged error. Even constitutional errors will not be noticed on federal habeas corpus review if an adequate and independent state law ground exists for upholding the conviction or sentence. *Coleman v. Thompson,* 501 U.S. 722, 729-32(1991). The time limit

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[1] The court in *Godfrey* found that it lacked jurisdiction to hear the defendant's motion to withdraw because the defendant had a pending motion to reopen his direct appeal in the Court of Appeals. *Godfrey*, 54 Fed. Appx. at 432.

prescribed by a state for filing an appeal is an adequate and independent state ground. *Id.* at 751.

However, the procedural default may be excused if the petitioner shows cause for the procedural default and prejudice from the alleged error. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). Specifically, the Sixth Circuit's *Maupin* decision sets out four inquiries that a district court should make when the state argues that a habeas claim has been defaulted by petitioner's failure to observe a state procedural rule. First, the court must determine whether there is such a procedural rule that is applicable to the claim at issue and whether the petitioner did, in fact, fail to follow it. *Id.* at 138. Second, the court must decide whether the state courts actually enforced its procedural sanction. *Id.* Third, the court must decide whether the state's procedural forfeiture is an "adequate and independent" ground on which the state can rely to foreclose review of a federal constitutional claim. Such a rule is adequate if it is regularly or consistently applied by the state court, *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988), and is independent if it does not depend on a federal constitutional ruling. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). And, fourth, the petitioner must demonstrate, consistent with

Wainwright v. Sykes, 433 U.S. 72 (1977), that there was "cause" for him to neglect the procedural rule and that he was actually prejudiced by the alleged constitutional error. *See also Coleman*, 501 U.S. at 750 ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice").

Federal habeas claims that have not been presented to the state courts or have been presented improperly to the state court generally are not cognizable on federal habeas review. A petitioner's failure to present a federal claim to the state courts for initial resolution involves an issue of exhaustion of state court remedies. Invoking principles of comity and federalism, federal courts have long required state prisoners to exhaust the "available state remedies" before addressing the merits of a federal claim on federal habeas review. Coleman v. Thompson, 501 U.S. 722, 731 (1991).

In order to exhaust available state remedies, a petitioner must first fairly present the substance of his federal habeas corpus claims to the state courts. *See Picard v. Connor*, 404 U.S. 270, 275 (1971); *Anderson v. Harless*, 459 U.S. 4, 6 (1982). The exhaustion requirement is not satisfied until the highest court in the state in which petitioner was convicted has been given a full and fair opportunity to rule on all of the prisoner's claims. *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990).

Further, a court may dispense with the exhaustion requirement when the claim was procedurally defaulted, "because in such a case there are no longer remedies available for petitioner to exhaust." *See Carpenter v. Mohr*, 163 F.3d 938, 944 (6th Cir. 1998); *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986) (Where petitioner could have raised a claim in the state courts, but that claim is now barred by state rules, that claim is considered procedurally defaulted).

III. Standard of Review under the AEDPA

The relevant provisions of AEDPA state:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be

> granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (1996).

Federal courts are bound by a state court's determination of a petitioner's claims, unless the decision by the state court involved an unreasonable application of clearly established federal law. *Franklin v. Francis*, 144 F.3d 429, 433 (6th Cir.1998). In *Williams v. Taylor*, 529 U.S. 362, 411 (2000), the Supreme Court held that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that

application must also be unreasonable." Stated differently, "a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The Court noted that the term "unreasonable" is "no doubt difficult to define," but the Court did not expound on the word's meaning in this context, instead stating that "it is a common term in the legal world, and, accordingly, federal judges are familiar with its meaning." *Id.* at 410.

The Sixth Circuit interprets the *Williams* test to mean if a court "believe[s] that a state court incorrectly applied federal law, [it] must refuse to issue the writ of habeas corpus if [it] finds that the state court's decision was a reasonable one." *Machacek v. Hofbauer*, 213 F.3d 947, 953 (6th Cir. 2000).

IV. Analysis

A. *Denial of Hearing on Motion to Withdraw Guilty Plea: Ground One*

In his first ground for relief, Zudell claims the trial court violated his right to due process when it denied him a hearing on the motion to withdraw his guilty plea. Zudell

presents two separate issues in an attempt to establish a due process violation. Zudell asserts that: (1) Ohio courts only allow a defendant to file either a motion to withdraw guilty plea or an appeal of the trial court's judgment/sentence; and (2) his plea was not knowingly and voluntarily made because (a) the State improperly informed him that it did not have to prove "penetration" in order to convict him and (b) he was not aware that he was going to receive a 36 to 90 year sentence.

1. *Procedural Default: Unknowing and Involuntary Plea*

Respondent asserts that Zudell has procedurally defaulted the part of the claim regarding his alleged unknowing and involuntary plea because he failed to fairly present it to the state courts.

Viewing the state appeals most favorably to Zudell, this Court concludes that Zudell only raised the issue pertaining to the election of filing either a motion to withdraw guilty plea or an appeal of the trial court's judgment/sentence in the state courts?[2] *See* Zudell II.

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[2] This Court even questions whether Zudell fairly presented this part of his claim to the Ohio Supreme Court. In his appeal to the Ohio Supreme Court,

However, Zudell did not raise the issue regarding his alleged unknowing and involuntary plea in either his direct appeal or in his post-conviction appeal. Therefore, Zudell did not fairly present the unknowing and involuntary plea claim to the state courts and is now precluded from doing so because the claim would be procedurally barred. *See Murray*, 477 U.S. at 485. For purposes of federal habeas review, Zudell's unknowing and involuntary plea claim is procedurally defaulted.

In an attempt to show cause to excuse the default, Zudell claims that he could not present the unknowing and involuntary plea claim to the state court because the court lost jurisdiction to consider his motion to withdraw his guilty plea when he appealed the trial court's judgment. Zudell's argument is insufficient to establish cause. Under Ohio law, a defendant may file a motion to withdraw a guilty plea after sentence is imposed but must demonstrate

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Zudell only claimed that the Court of Appeals misinterpreted a state case in affirming the trial court's decision that it lacked jurisdiction to hear Zudell's motion to withdraw plea. However, Zudell did not specifically present to the Ohio Supreme Court the issue before this Court, *i.e.*, whether the trial court erred in failing to afford him a hearing on his motion to withdraw guilty plea.

a manifest injustice in order for the court to grant the motion. *See* Ohio Crim.R. 32.1. Zudell has failed to show that he was precluded from filing a motion to withdraw the plea after the trial court imposed sentence but before he appealed the trial court's judgment.

Zudell also alleges that his plea was unknowing and involuntary, in part, because the State informed him that he would be sentenced only to 5 to 25 years if he pleaded guilty. However, after the trial court sentenced Zudell to 36 to 90 years, Ohio rules permitted Zudell to challenge his plea on the ground of a manifest miscarriage of justice, but Zudell chose not to do so. Instead, Zudell appealed the trial court's judgment and sentence; and as a result of the Court of Appeals' affirmance of the trial court's judgment and sentence, the trial court lost jurisdiction to consider Zudell's subsequent motion to withdraw the plea under Ohio law. *See Special Prosecutors*, 55 Ohio St.2d at 97-98.

Therefore, Zudell has procedurally defaulted the part of his first ground for relief regarding his unknowing and involuntary plea and has failed to show cause in order for this Court to excuse the default. Accordingly, this part of Zudell's claim should be dismissed.

2. *Denial of Hearing on Motion to Withdraw Guilty Plea: Ground One*

As part of his first ground for relief, Zudell also claims the trial court violated his right to due process when it denied him a hearing on the motion to withdraw his guilty plea. Zudell asserts that Ohio courts require a defendant to elect to file either a motion to withdraw a guilty plea or an appeal of the trial court's judgment and sentence.

a. *Claim Not Fairly Presented as Federal Constitutional Issue in State Court*

Respondent asserts that Zudell's claim is waived because Zudell failed to present the claim as a federal constitutional issue in the state court. The Court of Appeals affirmed the trial court's denial of Zudell's motion to withdraw his guilty plea for lack of jurisdiction without affording Zudell a hearing. In doing so, the Court of Appeals relied solely on state law for the proposition that a trial court does not have jurisdiction to maintain and determine a motion to withdraw the guilty plea subsequent to an appeal of the trial court's judgment/sentence and an

affirmance by the appellate court. (Doc No. 12, Exh. 16, pp. 2-4.)

Neither a violation of state law nor a state court's decision applying purely state law may be reviewed by a federal habeas corpus court as those issues do not pose constitutional questions. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). A question concerning a perceived error of state law rarely serves as a basis for habeas corpus relief, and does so only when the petitioner is denied fundamental fairness in the trial process. *Id.*

Although the Court of Appeals relied solely on state law in dismissing Zudell's claim, this Court nevertheless will review Zudell's claim for a federal constitutional violation because (1) Zudell make a general reference to a due process violation in his brief to the Ohio Supreme Court and (2) a federal court reviews state court decisions based solely on state law to determine whether the petitioner was denied fundamental fairness in violation of the Due Process Clause.

b. ***Review for Due Process Violation***

Zudell claims the trial court violated his right to due process when it denied him a hearing on his motion to

withdraw his guilty plea. Zudell asserts that his right to file a motion to withdraw a guilty plea is illusory because the trial court loses jurisdiction to rule on the motion upon an appeal. However, as Zudell could have filed his motion to withdraw his guilty plea after the trial court imposed the sentence, Zudell has not shown he was denied fundamental fairness or due process. Therefore, Zudell's claim should be dismissed.

B. *Cruel and Unusual Punishment: Ground Two*

In his second ground for relief, Zudell alleges that the trial court's sentence violates the Eighth Amendment's ban on cruel and unusual punishment. Zudell claims the sentence is patently disproportionate to the crime because: (1) the crime arguably was caused by an aberration induced by his withdrawal symptoms from a prescribed medication for a diagnosed character disorder; and (2) a person convicted of a single count of aggravated murder would only serve twenty years prior to being eligible for parole.

At the sentencing hearing, the trial court admitted and reviewed documents relating to Zudell's illness into evidence, *i.e.*, a letter written by Zudell's mother, three published articles, and a portion of a letter apparently from

Zudell's psychiatrist.[3] (Sentencing Hearing transcript, p. 20.) The court also allowed Zudell's mother to address the court, wherein she indicated that Zudell's doctor determined he is not a pedophile. The trial court sentenced Zudell to a prison term of: seven to twenty-five years each on two rape counts and the felonious sexual penetration count; five years each on three rape counts; one and one-half years each on two sexual gross imposition counts; and three years each on two gross sexual imposition counts.[4]

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[3] The Court of Appeals summarized the documents and determined that there was insufficient documentation of Zudell's use of the medication to permit the trial court to conclude that Zudell's use of the drug or his withdrawal from it was in any way related to his criminal behavior. (Doc. No. 12, Exh. 7, pp. 137-38.) In regard to the documents addressing Zudell's mental illness, the Court of Appeals found it unclear how information describing instances of Zudell's impulsivity would support a reduced sentence. Moreover, the Court of Appeals noted that whatever problems Zudell may have had with controlling his impulses, a police detective testified at the sentencing hearing that the investigation revealed Zudell's acts were premeditated. *Id.* at 138.

[4] The Court was not required to sentence Zudell to the shortest prison term authorized for the offense because it found the shortest prison term would

The trial court ordered the sentences on the rape and felonious sexual penetration counts be served consecutively, and the remaining sentences be served concurrently.[5] (Doc. No. 12, Exhs. 3, 7.) The Court of Appeals found that the trial court's imposition of above-minimum and consecutive sentences were permitted by law and supported by the record. In dismissing this claim, the Court of Appeals held that given the numerous counts of sexual assault committed by Zudell against his own daughter over three years, the imposition of consecutive

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demean the seriousness of the Zudell's conduct and would not adequately protect the public from future crime by Zudell. *See* O.R.C. § 2929.14(B).

[5] Pursuant to O.R.C. § 2929.14(C), the trial court found that: consecutive sentences were necessary to protect the public from future crime or to punish Zudell, and were not disproportionate to the seriousness of Zudell's conduct and the danger he posed to the public; and the harm caused by Zudell was so great or unusual that no single prison term for the crimes as part of a single course of conduct adequately reflected the seriousness of Zudell's conduct. (Sentencing hearing transcript, pp. 25-26.)

sentences did not constitute "sanctions which under the circumstances would be considered shocking to any reasonable person." (Doc. No. 12, Exh. 7, p. 141.)

The Eighth Amendment to the U.S. Constitution states that "cruel and unusual punishments [shall not be] inflicted." In evaluating Eighth Amendment claims, the Supreme Court has set forth a "narrow proportionality principle." *See Harmelin v. U.S.*, 501 U.S. 957, 959-60 (1991); *see also U.S. v. Hopper*, 941 F.2d 419, 422 (6th Cir. 1991). Under this approach, strict proportionality between a crime and its punishment is not required; consequently, only an extreme disparity between the crime and punishment offends the Eighth Amendment. *See U.S. v. Marks*, 209 F.3d 577, 583 (6th Cir. 2000); *see also Hopper*, 941 F.2d at 422. Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence for multiple crimes. *See Hawkins v. Hargett*, 200 F.3d 1279, 1285, n.5 (10th Cir. 1999) (citing *O'Neil v. Vermont*, 144 U.S. 323, 331 (1892). Further, a sentence within the statutory maximum set by statute generally does not constitute cruel and unusual punishment. *See Austin v. Jackson*, 213 F.3d 298, 302 (6th Cir. 2000).

In the instant action, Zudell's argument regarding his withdrawal symptoms and character disorder at the time of the crimes has no merit. The court reviewed and considered Zudell's evidence before imposing the sentence; but, given the heinousness of Zudell's acts against his seven-year old daughter over a period of three years, the Court made the required findings under Ohio law in order to impose (1) above-minimum (but within the maximum range) sentences and (2) consecutive sentences. *See Austin*, 213 F.3d at 302 (generally no cruel and unusual punishment when sentence within statutory maximum range). Zudell's comparison to an aggravated murder sentence is also unavailing. Zudell presents no legal support which states that a sentence for one count of a more heinous offense must exceed the total sentence for numerous counts of less heinous offenses. Given the seriousness of the Zudell's crimes committed against his daughter, an extreme disparity does not exist between the crimes and punishment imposed. *See Moore v. Cowan*, 560 F.2d 1298 (6th Cir. 1977) (holding life sentence without parole for rape of female over 12 years old was not unconstitutional); *see also Lockyer v. Andrade*, 538 U.S. 63 (2003) (no Eighth Amendment violation where defendant

was sentenced to 50 years to life in prison for stealing $153 worth of videotapes because the sentence is not contrary to nor an unreasonable application of clearly established federal law). Therefore, the Court of Appeals' decision is neither contrary to, nor an unreasonable application of clearly established federal law. Zudell's claim should be dismissed.

V. Evidentiary Hearing

Zudell requests that this Court hold a hearing so he may offer proof concerning his grounds for relief. A district court has discretion and inherent authority to order evidentiary hearings to settle disputed issues of material fact. *Abdur'Rahman v. Bell*, 226 F.3d 696, 706 (6th Cir. 2000). A habeas petitioner who has not developed the record in state court is entitled to an evidentiary hearing only if he shows (1) cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure or (2) that a fundamental fairness miscarriage of justice would result from failure to hold a federal evidentiary hearing. *Mitchell v. Rees*, 114 F.3d 571, 577 (6th Cir. 1997). Zudell has not presented any argument demonstrating the need for an evidentiary hearing.

Accordingly, Zudell's request should be denied.

VI. Conclusion

For the forgoing reasons, the Magistrate Judge recommends Zudell's Petition for Writ of Habeas Corpus (Doc. No. 1) be DENIED. Also, Zudell's request for an evidentiary hearing should be denied.

/s/ Nancy A. Vecchiarelli
U.S. Magistrate Judge

Date: July 21, 2004

OBJECTIONS

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of this notice. Failure to file objections within the specified time may waive the right to appeal the District Court's order. ***See United States v. Walters,*** **638 F.2d 947 (6th Cir.1981).** ***See also Thomas v. Arn,*** **474 U.S. 140 (1985),** ***reh'g denied,*** **474 U.S. 1111 (1986).**

STATE OF OHIO, Appellee
v.
CHRISTOPHER ZUDELL, Appellant

C.A. No. 02CA007982

COURT OF APPEALS OF OHIO,
NINTH APPELLATE DISTRICT,
LORAIN COUNTY

2002 Ohio 4253; 2002 Ohio App. LEXIS 4419

August 21, 2002, Decided

PRIOR HISTORY: [**1] APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO. CASE No. 98 CR 051488.

DISPOSITION: Judgment affirmed.

COUNSEL: MICHAEL J. O'SHEA, Attorney at Law, Cleveland, OH, for appellant.

Gregory A. White, Prosecuting Attorney, Elyria, OH, for appellee.

JUDGES: DONNA J. CARR, Judge. SLABY, P.J., WHITMORE, J., CONCUR.

OPINION BY: DONNA J. CARR

OPINION: DECISION AND JOURNAL ENTRY

Dated: August 21, 2002

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Judge.

[*P1] Appellant, Christopher Zudell, appeals the decision of the Lorain County Court of Common Pleas. This Court affirms.

I.

[*P2] In February 1998, appellant was charged with five counts of rape, in violation of *R.C. 2907.02(A)(1)(b)*; four counts of gross sexual imposition, a violation of *R.C. 2907.05(A)(4)*; and one count of felonious sexual penetration, a violation of *R.C. 2907.12(A)(1)(b)*. Appellant pleaded guilty

in August 1999 and the trial court sentenced him to incarceration for a period of thirty-six to ninety years. Appellant appealed his sentence [**2] to this Court, which upheld his sentence in a journal entry dated July 26, 2000. See *State v. Zudell* (July 26, 2000), 9th Dist. No. 99 CA007477, 2000 Ohio App. LEXIS 3353.

[*P3] On May 1, 2001, appellant filed a motion to withdraw his guilty plea. The trial court denied appellant's motion. Appellant timely appealed, setting forth one assignment of error for review.

II.

ASSIGNMENT OF ERROR

[*P4] "THE TRIAL COURT ERRED BY NOT PERMITTING A HEARING ON DEFENDANT-APPELLANT'S MOTION TO WITHDRAW HIS PLEA."

[*P5] Appellant argues that he was entitled to a hearing on his Motion to Withdraw Plea. This Court disagrees.

[*P6] *Crim.R. 32.1* governs the withdrawal of guilty pleas. It states:

[*P7] "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to

correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." A defendant who seeks to withdraw or vacate a guilty plea after his sentence is imposed must demonstrate a manifest injustice. *State v. Smith (1977), 49 Ohio St.2d 261, 3 Ohio Op. 3d 402, 361 N.E.2d 1324,* paragraph one of the syllabus.

[*P8] The Supreme Court of Ohio addressed this same issue [**3] in *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas (July 12, 1978), 55 Ohio St.2d 94, 9 Ohio Op. 3d 88, 378 N.E.2d 162.* In addressing the jurisdiction of the trial court once an appeal has been taken and affirmed, the Supreme Court of Ohio stated:

[*P9] "Yet, it has been stated that the trial court does retain jurisdiction over issues not inconsistent with that of the appellate court to review, affirm, modify or reverse the appealed judgment, such as the collateral issues like contempt, appointment of a receiver and injunction. *** However, in the instant cause, the trial court's granting of the motion to withdraw the guilty plea and the order to proceed with a new trial were inconsistent with the judgment of the Court of Appeals affirming the trial court's conviction premised upon the guilty plea. The judgment of the reviewing

court is controlling upon the lower court as to all matters within the compass of the judgment. Accordingly, this Court finds that the trial court lost its jurisdiction when the appeal was taken, and, absent a remand, it did not regain jurisdiction subsequent to the Court of Appeals' decision.

[*P10] "Furthermore, *Crim.R. 32.1* does not vest jurisdiction [**4] in the trial court to maintain and determine a motion to withdraw the guilty plea subsequent to an appeal and an affirmance by the appellate court. While *Crim.R. 32.1* apparently enlarges the power of the trial court over its judgments without respect to the running of the court term, it does not confer upon the trial court the power to vacate a judgment which has been affirmed by the appellate court, for this action would affect the decision of the reviewing court, which is not within the power of the trial court to do." (Citations omitted.) *Special Prosecutors* at 97-98.

[*P11] In this case, appellant originally pleaded guilty in August 1999 and was sentenced by the trial court in October 1999. Appellant then appealed his sentence to this Court, and the trial court lost its jurisdiction to consider a motion from appellant to withdraw his guilty plea. Since appellant's conviction was upheld by this Court in a journal entry dated July 26, 2000, the trial court lacked jurisdiction to

consider appellant's motion to withdraw his guilty plea, which was filed on May 1, 2001.

III.

[*P12] The decision of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court [**5] finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27.*

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E).* The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to *App.R. 30.*

Costs taxed to appellant.

Exceptions.

DONNA J. CARR
FOR THE COURT

SLABY, P.J.

WHITMORE, J.

CONCUR